

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

**FOR THE MINNESOTA DEPARTMENT OF PUBLIC SAFETY
ALCOHOL & GAMBLING ENFORCEMENT DIVISION**

In the Matter of the Retailer's License
of Peterson Properties/Virginia, Inc.,
d/b/a Popper's

**ORDER ON MOTION
FOR SUMMARY DISPOSITION**

This matter was initiated by the Minnesota Department of Public Safety, Alcohol & Gambling Enforcement Division, (hereinafter the "Department") by a Notice of and Order for Prehearing Conference and also a Statement of Charges, both dated October 21, 1997, which were duly served upon the Respondent, Peterson Properties/Virginia, Inc., d/b/a Popper's (hereinafter the "Popper's"). The issue to be determined in this proceeding is whether Popper's license to sell intoxicating liquor should be suspended or revoked, or a civil penalty imposed, because of violations by Popper's of Minn. Stat. ch. 340A (1996) and Minn. R. ch. 7515 (1995).^[1]

On February 20, 1998, the Department moved for summary disposition on the grounds that no genuine issue of material fact exists with respect to this proceeding and that, as a matter of law, the Department is entitled to prevail on the merits. On March 9, 1998, Popper's filed a memorandum in response to the motion for summary disposition in which it asserted that genuine issues of material fact do exist and that this matter is therefore not susceptible of summary disposition.

The above-entitled matter is, therefore, before the undersigned Administrative Law Judge on the Department's motion for summary disposition. E. Joseph Newton, Assistant Attorney General, Suite 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department. James R. Cope, Attorney at Law, 415 First Street South, Virginia, Minnesota 55792, appeared on behalf of Popper's. The record closed on this motion on March 9, 1998, upon receipt of Popper's memorandum responding to the Department's motion for summary disposition.

Based upon all of the records, files, and proceedings herein, IT IS HEREBY ORDERED that the Department's motion for summary disposition is DENIED.

Dated this 12th day of March, 1998.

/s/

BRUCE H. JOHNSON
Administrative Law Judge

MEMORANDUM

In considering motions for summary disposition in administrative contested case proceedings, administrative law judges look to the standards developed in district court practice for considering motions for summary judgment. See Minn. Rules, pt. 1400.6600 (1997). Like summary judgment, summary disposition is appropriate “where there is no genuine issue as to any material fact.” Minn. Rules, pt. 1400.5500(K); compare Minn. R. Civ. P. 56.03; Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Theile v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). In a motion for summary disposition made by the party having the burden of proof, the initial burden is on the moving party to show facts that establish a prima facie case and to assert that no material issues of fact remain for hearing. Id. Once the moving party has established a prima facie case, the burden shifts to the non-moving party. Minnesota Mutual Fire and Casualty Company v. Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990). To successfully resist a motion for summary disposition where a prima facie case has been established, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). General averments are not enough to meet the non-moving party’s burden under Minn. R. Civ. P. 56.05. Id.; Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). In considering a motion for summary disposition, any doubts, factual inferences, or issues of witness credibility must be resolved in the light most favorable to the nonmoving party — here, Popper’s. Sauter v. Sauter, supra, 70 N.W.2d at 353; Deli v. Hasselmo, 542 N.W.2d 649, 653 (Minn. App. 1996).

Counts V and VI of the Statement of Charges essentially allege that on September 18, 1996, Popper’s violated Minn. Stat. § 340A.503, subd. 1, by allowing two individuals under the age of 21 years to drink alcoholic beverages on its premises. In support of its motion for summary disposition, the Department tendered three signed, but unsworn, statements given to the Virginia, Minnesota, Police Department by the two alleged underage drinkers and by one other witness to the events of September 18, 1996. (Exhibits C, D, and E attached to the Affidavit of E. Joseph Newton of February 20, 1998, hereinafter “Newton Affidavit”) The mere fact that these statements were given to the police does not make them conclusively credible, particularly where there is no corresponding police report that assesses or otherwise sheds light on the reliability of those statements. Nor does the record contain any other indicia of reliability. On the other hand, Popper’s flatly asserts that those statements are false and makes an offer of proof of testimony it intends to produce at the hearing to establish the falsity of those statements. The Administrative Law Judge is obliged to view the evidence, including issues of witness credibility, in the light most favorable to Poppers, as the nonmoving party. He therefore concludes that a genuine dispute exists with respect to whether Popper’s did, in fact, allow individuals under the age of 21 years to drink alcoholic beverages on its premises on September 18, 1996.

Count VIII of the Statement of Charges alleges that on Sunday, March 23, 1997, Popper's violated Minn. Stat. § 340A.504, subd. 3(c), by serving intoxicating liquor on Sunday without having a license to do so. In support of its motion, the Department submitted evidence that Popper's did not hold a Sunday on-sale liquor license with the City of Virginia. (Newton Affidavit, Exhibit F) Moreover, in response to the Department's Request for Admissions No. 17, Popper's denied that "individuals were provided with beer and alcoholic beverages," but admitted that "individuals present at Respondent's licensed premise on March 23, 1997, consumed beer and alcoholic beverages at Respondent's license premise on March 23, 1997." The Department argues that the fact that individuals consumed alcoholic beverages on Popper's premises on the Sunday in question necessarily supports the inference that the establishment was "serving" them intoxicating liquor within the meaning of Minn. Stat. § 340A.504, subd. 3(c).

By way of defense to this charge, Popper's makes an offer of proof of the following facts: The front door to the premises was locked, and the bar was not open for business on the day in question. Neither the owner nor any employees were present on the premises. A small group of individuals were meeting on the premises to form a fantasy baseball league. Although members of that group did consume alcoholic beverages during the course of that meeting, no money changed hands. No charges were brought by the Virginia police as a result of the incident. Rather, the Virginia Police Department is on record as stating that it was the City's policy that bars without Sunday liquor licenses could be the sites of private parties on Sundays so long as the doors to the business remained locked. (Exhibit C to the Affidavit of James R. Cope)

Count VIII of the Statement of Charges raises some contested issues. The first is whether or not the activities that Popper's admits occurred on its premises on March 23, 1997, constitute "serving," as that term is used in Minn. Stat. § 340A.504, subd. 3(c). The Department argues that the Minnesota Supreme Court has already resolved that issue in a way that is favorable to the Department's position and that the Administrative Law Judge should conclude, as a matter of law, that the term "serving," as it appears in the governing statute, includes the activities which Popper's concedes occurred on its premises on March 23, 1997. In support of this position, it cites City of St. Paul v. St. Aubin, 275 N.W. 623 (Minn. 1937) and City of St. Paul v. Keeley, 260 N.W. 357 (Minn. 1935). Both cases, however, are inapposite. The ordinance under consideration in St. Aubin proscribed "no business of any kind or character" during closing hours rather than only "serving intoxicating liquor," as set forth in Minn. Stat. § 340A.504, subd. 3(c). That case therefore sheds no light on the issues in this case. Similarly, in Keeley, the ordinance in question prohibited the consumption of liquor on the premises later than one-half hour after sale was prohibited. The Minnesota Supreme Court held that the evidence supported an inference by the trier of fact in a criminal prosecution that liquor was being consumed on the premises at a time later than the time allowed by law. In other words, the case involved a different operative term, and the Court merely held that an inference was permitted, not that it was compelled. Neither the Department's factual submission nor Popper's offer of proof provide definitive answers to at least three factual questions that may be material to a

determination of whether Popper's violated Minn. Stat. § 340A.504, subd. 3(c) — namely, (1) whether the alcoholic beverages the individuals were drinking on Popper's premises on March 23, 1997, were part of Popper's stock; (2) if so, whether the individuals paid Popper's for the beverages they drank; and (3) if the alcoholic beverages being drunk were not provided by Popper's, how the individuals on its premises came to be in possession of them. For these reasons, summary disposition of the claims set forth in Count VIII of the Statement of Charges is also inappropriate.

Finally, even if the Administrative Law Judge could conclude that Popper's did commit the violations of law alleged by the Department, there is the further question of which remedy or penalty the Commissioner may choose to impose. For example, in the memorandum of law supporting its motion, the Department argues that "[a] judicial finding the Respondent's admitted activity complies with the statute would allow for after hour private parties and all night drinking effectively eliminating any hours restrictions." This, the Department further argues, "would be detrimental to the local community" and would undermine "local control of a highly regulated industry." (Defendant's Memorandum at p. 7) On the other hand, Popper's points to a letter it intends to offer into evidence from the Virginia Police Department indicating that it is permissible for bars to make their premises available for private parties on Sunday. In short, facts that might reasonably be considered by the Commissioner in mitigation of any sanction or penalty are also material to this matter, and summary disposition should not foreclose Popper's from making a factual record in connection with that issue.

For the reasons set forth above, the Department's motion for summary disposition is denied.

B. H. J.

^[1] Unless otherwise specified hereafter, citations to Minnesota Statutes and to Minnesota Rules refer to the 1996 and the 1997 editions of the same, respectively.